

89-1145

Supreme Court, U.S.
FILED

JAN 16 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NO. _____

LINDA McCracken,

Petitioner

versus

CITY OF COLLEGE PARK, GEORGIA, et al

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

KIRBY G. BAILEY
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Counsel for Petitioner



QUESTIONS PRESENTED

1. Is it a violation of the due process clause of the Constitution of the United States of America for a City ordinance to impose vicarious liability upon the holder of a beer and wine license based upon the criminal act of an employee?

2. Where an employee of a licensed beer and wine retail merchant acts in violation of training rules and instructions and violates a State law regarding sale of beer to minors, is it constitutional to punish the employer by suspension of her license to sell beer and wine merely and solely upon the basis that her employee violated the law?

3. In such a case as is suggested by the foregoing facts, is there a prerequisite to satisfy due process such as evidence that the employer was personally culpable or negligent in some manner either in hiring the employee or in the training or instruction of said employee?

LIST OF PARTIES

1. The Petitioner is LINDA McCRACKEN, an individual.
2. The Respondents are the CITY OF COLLEGE PARK, GEORGIA; T. OWEN SMITH, Mayor of the City of College Park; and OTIS SCOGIN, ANTHONY HIGHTOWER, JESSE A. DENT, THOMAS G. WALLER, ROBERT A. WILSON and HERMAN A. BARNARD, Councilmen of the City of College Park.

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OPINION BELOW

The opinion of the Supreme Court of Georgia is reported as *McCracken vs. City of College Park*, 259 Ga. 490, and is reproduced as Appendix "A" hereto.

JURISDICTION

The judgement of the Supreme Court of Georgia was entered on October 19, 1989. This Court has jurisdiction under 28 U.S.C. §1254(i).

ORDINANCE INVOLVED

This case involves Section 3-45(d) of the Code of Ordinances of College Park, Georgia and is reproduced as Appendix "B".

STATEMENT OF THE CASE

Petitioner had operated a "mom and pop" grocery store in College Park, Georgia for several years before May 12, 1987. Neither she nor any member of her family had ever been convicted of, or even charged with, any violation of law. On that date an employee of hers, who likewise had never been convicted of, or charged with, any violation of law, was minding the store and conducting a conversation with her boyfriend when an undercover agent of the police force of the City of College Park, a bearded youth of 19, bought a bottle of beer without being asked for identification or proof that he was 21 years of age.

On May 27, 1987, a hearing was held by the Mayor and City Council of College Park, Georgia and her license to sell beer and wine was suspended for 120 days. No evidence against Petitioner was presented other than the fact that said employee had sold a beer to one under 21 years of age. The authority for such suspension by Respondents was Section 3-45(d) of the Code of Ordinances of College Park. (See Appendix "B")

PROCEEDINGS IN GEORGIA STATE COURTS

Petitioner filed an action in equity in the Superior Court of Fulton County seeking an injunction and damages from Respondents. The injunction was denied and Petitioner filed an ancillary action seeking certiorari of the hearing of May 27, 1987 to the Superior Court of Fulton

County. The action in equity lay dormant while the certiorari action was prosecuted to an unsuccessful conclusion. The appellate court of Georgia denied a request for discretionary appeal from the adverse ruling on the certiorari action, and the suspension of Petitioner's license was imposed.

Thereafter, Petitioner prosecuted her original suit in equity for damages. The Petitioner moved for partial summary judgment on the issue of the constitutionality of the City ordinance in question and the same was denied. The Respondents moved for summary judgment on the same issue under the theory of *res adjudicata*, based upon the ancillary action of certiorari having met with failure, and it was granted.

Thereafter followed an appeal to the Supreme Court of Georgia where, among other things, the issue of constitutionality of the City ordinance in question was litigated. The Supreme Court of Georgia sustained the lower court on both decisions.

REASONS FOR GRANTING THE WRIT

This case presents a question of the constitutionality of a City ordinance which imposes sanctions on citizens of the United States based solely upon the occurrence of an arbitrary event over which the citizen has no control. This ordinance authorizes the taking of property rights,¹ without any personal culpability or negligence on the part of the punished party. The sole basis for punishment is the criminal act of an employee.

The decision of the Supreme Court of Georgia acknowl-

¹ In this case the right to sell beer and wine during the summer months (when such sales are at their highest), which resulted in an undetermined, but potentially large, financial loss.

edges that such an ordinance which imposes criminal sanctions is unconstitutional. *Davis vs. City of Peachtree City*, 251 Ga. 219. But they distinguish the instant case upon the basis that in *Davis* the sanctions were criminal, but that the sanctions here are civil. The Petitioner fails to appreciate this fine distinction because to her the pain of one is equal to the pain of the other. A rose is a rose...

The Georgia Supreme Court justifies the ordinance on the grounds of public need. The youth of our country need to be protected from the evils of alcohol and through the use of legal coercion merchants can be turned into policemen of their employees in order to prevent violations that are difficult to uncover and prove. The merit of this argument is difficult to disparage because the youth of our country deserve protection. But there needs to be a line drawn somewhere, or else a weapon is created to harm the innocent.

It may well be that there are unscrupulous merchants who exploit youth, motivated by greed to hide behind expendable employees. Greater punishment than license revocation is deserved by such persons, but it is one thing to ferret out these criminals and another to punish the innocent along with the guilty. The law should, in order to be constitutional, require some proof of culpability or negligence on the part of the accused and not just merely require that a wrong has occurred in order to impose sanctions.

In a way, this ordinance is not dissimilar to the practice of the SS in occupied countries during World War II where, in order to punish partisan activities, they would arbitrarily execute citizens at random to punish those guilty of sabotage. From the standpoint of the SS, this procedure was justified because it saved German lives and deterred further insurrection. But from the standpoint of those executed, the guilty know the risk they had taken, but the innocent had a just argument that they had been murdered. In the present case, Plaintiff is indignant for being punished for something

she did not do. And the record is bereft of any proof that she acted in any way but innocently and correctly.

The aim of the ordinance in question is correct and worthy. It is just that it is pointed in the wrong direction. It would be simple to make such a law constitutional. First, it could require that the prosecution introduce evidence of culpability or negligence before vicarious liability could be imposed. If this is too hard, perhaps the proof of a violation could be used to shift the burden to the licenseholder to prove lack of culpability or negligence. Perhaps a graduated scale could be devised with a warning on the first violation and increasing punishment for further violations. There must be a better way than by punishing the innocent with the guilty.

Another conclusion reached by Petitioner is the potential for misconduct on the part of the enforcers of such a law. A dishonest politician (and the Mayor and City Council of College Park are politicians) could use such a law as a weapon. In a normal situation a tribunal must have evidence of guilt before it can punish. With this law the honesty and integrity of the tribunal is an absolute must because it does not need evidence to punish. The law that allows control of the citizenry without proof of individual guilt is a law that puts us at the mercy of those governmental officials who are either corrupt or inept.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

THE BAILEY LAW OFFICES, P.C.

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Counsel for Petitioner

APPENDIX "A"

S89A0392. McCracken v. CITY OF COLLEGE PARK.

GREGORY, Justice.

This appeal arises from the superior court's grant of summary judgement in favor of the city and the denial of summary judgement for McCracken. McCracken argues the trial court's judgements are in error because it abused its discretion in opening default, because *res judicata* does not bar this action, and because the ordinance, under which her beer and wine license was suspended, is unconstitutional. We affirm.

This case arose after one of McCracken's employees sold beer to a minor without checking the minor's identification. This was in violation of Section 3-45 (d) of the Code of Ordinances of the City of College Park.¹ The mayor and council of the city held a hearing to ascertain the facts concerning the violation and voted to suspend her license for 120 days. McCracken then filed a writ of certiorari to the superior court. On the same day that the superior court dismissed the writ and affirmed the judgement, McCracken filed an action for an injunction and for damages sustained as a result of the enforcement of the ordinance. The city failed to answer after receiving assurances from McCracken's counsel in the certiorari proceedings that this second action would be dismissed. After learning that McCracken had not dismissed the second action, the city moved to open default. Some time after moving to open default, but before the court rendered its order opening default, the city paid the required costs.

¹ This ordinance permits the revocation of an alcoholic-beverage license when the licensee or an agent sells an alcoholic beverage to a minor after failing to check the purchaser's identification.

1. McCracken contends that it was error to open default because the city did not pay the required costs at the time it moved to open default and because the trial court abused its discretion. The first argument is without merit as the movant is only required to pay costs before the order granting the motion is entered. *Copeland v. Carter*, 247 Ga. 542 (277 SE2d 500) (1981). In its order opening default, the trial court found that the conditions for opening default, as set forth in OCGA § 9-11-55 (b), had been met, and our review of the record shows no abuse of discretion. See *Clements v. United Equity Corp.*, 125 Ga. App. 711 (188 SE2d 923) (1972).

2. "In order for the *res judicata* doctrine to apply, three prerequisites must be established: (1) identity of parties; (2) identify of the cause of action; and (3) prior adjudication by a court of competent jurisdiction." *State Bar of Ga. v. Beazley*, 256 Ga. 561, 562 (350 SE2d 422) (1986). McCracken argues that the doctrine does not bar this action because the latter two prerequisites are not met. We disagree.

McCracken contends that there are two separate causes of action because one action was a certiorari while the instant action is a suit in equity and a claim for damages. In these two actions, however, only one wrong is complained of, namely, the enforcement of an allegedly unconstitutional ordinance. The principal difference between the two actions is the nature of the relief sought. Therefore, the second prerequisite is met because

[s]o long as a party pleads but one wrong in respect to the same transaction, the cause of action is the same, [cit.] and it makes no difference that the remedy sought to be applied under different procedures growing out of the same wrong may be different.

Hamlin v. Johns, 41 Ga. App. 91 (2) (151 SE 815) (1929).

McCracken contends that there has been no final adju-

dication of the merits in a court of competent jurisdiction because her application to appeal from the superior court to the Court of Appeals in the certiorari action was denied. That is, she contends that because neither this Court of Appeals has reviewed the constitutionality of the ordinance, *res judicata* should not bar this action. OCGA § 9-12-40 does not require appellate review of a judgment before it can act as a bar to a later action. See *Quarterman v. Memorial Med. Center*, 176 Ga. App. 92 (2) (335 SE2d 589) (1985). Further, the Court of Appeals afforded the limited review of OCGA § 5-6-35. Therefore, because the superior court in the certiorari action has adjudicated the dispute between McCracken and the city, all the prerequisites for *res judicata* are met, and this action is barred.

Judgment affirmed. All the Justices concur.

DECIDED OCTOBER 19, 1989

Suspension of beer and wine license, etc.; constitutional question. Fulton Superior Court. Before Judge Fryer.

Kirby G. Bailey, for appellant.

Glaze, Fincher & Bray, *George E. Glaze*, *Steven M. Fincher*, *Laurel E. Henderson*, for appellee.

APPENDIX "B"

ALCOHOLIC BEVERAGES

Sec 3-45. Furnishing to purchase of, or possession by underaged persons of alcoholic beverages; proper identification for sale of alcoholic beverages; purchase, consumption, etc., by persons in the armed forces; dispensing, serving, etc., of alcoholic beverages by underaged persons in the course of employment.

(a) It shall be a violation of this Code for any agent, officer or employee of a licensee to fail to properly check the identification of any patron when selling or otherwise providing any alcoholic beverage, which failure results in an underaged person being sold or served, or to have in such underaged person's possession while on the licensee's premises, any alcoholic beverage.

(b) The prohibitions contained in paragraphs (1), (2), and (4) of subsection (a) of this section shall not apply with respect to the sale, purchase, or possession of alcoholic beverages for consumption:

- (1) For medical purposes pursuant to a prescription of a physician duly authorized to practice medicine in this state;
- (2) At a religious ceremony; or
- (3) In the home with parental consent.

(c) Any person violating the provisions of this section shall be punished as for a misdemeanor.

(d) Notwithstanding any criminal prosecution which may result from a violation of this section, any licensee employing any officer, agent or employee who fails to comply with the provisions of subsection (a) above, which failure results in an underaged person being sold or served, or to

have in such underaged person's possession while on the licensee's premises an alcoholic beverage, may have licensee's license revoked.

(e) If such conduct is not otherwise prohibited pursuant to O.C.G.A. § 3-3-24, nothing contained in this section shall be construed to prohibit any person under nineteen (19) years of age from:

- (1) Dispensing, serving, selling, or handling alcoholic beverages as a part of employment in any licensed establishment;
- (2) Being employed in any establishment in which alcoholic beverages are distilled or manufactured; or
- (3) Taking orders for and having possession of alcoholic beverages as a part of employment in a licensed establishment.

(f) Testimony by any underaged person, when given in an administrative or judicial proceeding against another person for violation of any provision of this section, shall not be used in any administrative or judicial proceeding brought against such testifying underaged person.

(g) Nothing in this section shall be construed to modify, amend, or supersede Chapter 11 of Title 15 O.C.G.A.

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Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA**

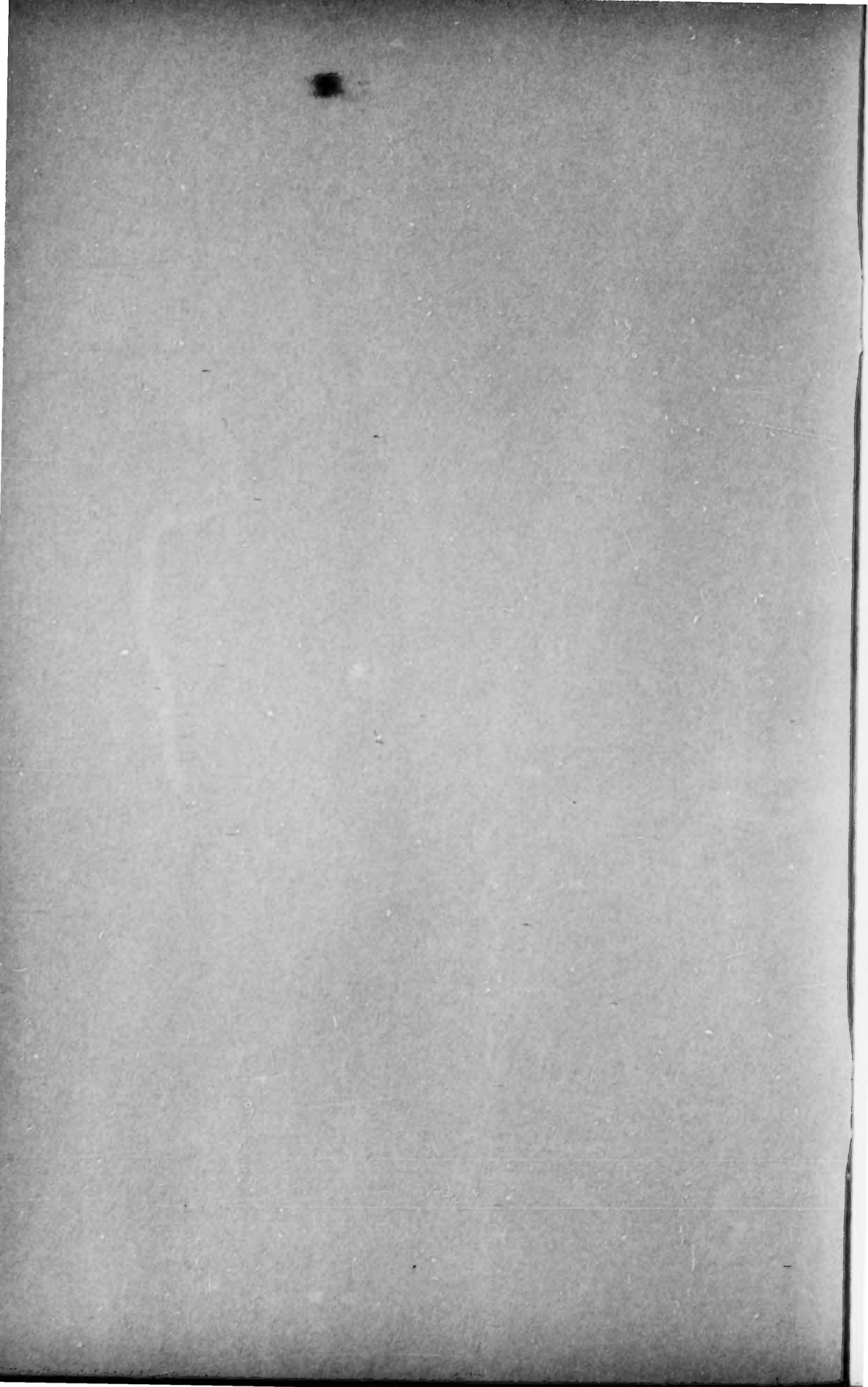
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Counsel for Respondents

February 15, 1990



QUESTIONS PRESENTED

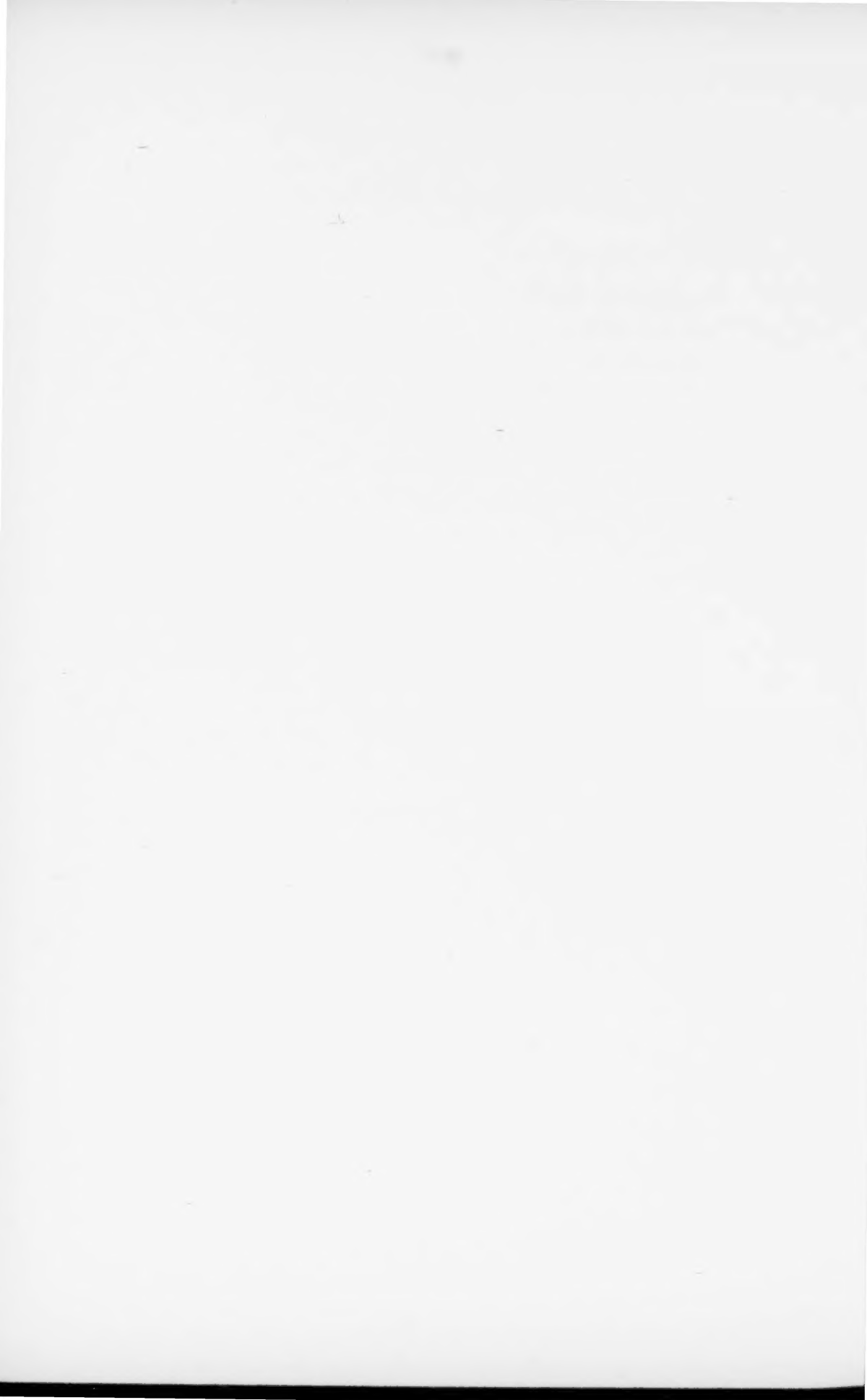
1. The Respondents maintain that none of the three alleged questions presented appear to the Court in a justiciable manner, as the ruling appealed from did not address any of these issues.

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OPINION BELOW

The opinion of the Supreme Court of Georgia is reported as *McCracken v. City of College Park*, 259 Ga. 490, and is reproduced as Appendix "A" to Petitioner's Brief.

JURISDICTION

The Respondents deny that 28 U.S.C. § 1245(i) is a jurisdictional authorization for any matter presented hereunder.

ORDINANCE INVOLVED

Respondents deny that an application of § 3-45(d) of the Code of Ordinances of College Park is involved in this petition.

STATEMENT OF THE CASE

Petitioner operated a gasoline/convenience store in College Park. On May 12, 1987, an employee of the Petitioner failed to check the identification of purchaser of alcoholic beverages, such failure to check the identification resulting in the sale of alcoholic beverages to an individual under the age of 19 years, a violation of state law of the State of Georgia. The employment and supervision of such an individual by the Petitioner subjected her to suspension of her license to sell alcoholic beverages in the city limits of the City of College Park pursuant to the terms of § 3-45(d) of the Code of Ordinances of the City of College Park (see Appendix D of Petitioner's Brief).

On May 27, 1987, a hearing was held by the Mayor and Council of the City of College Park on the issue of whether or not Petitioner's license to sell alcoholic beverages should be suspended for an appropriate period of time. Thereafter, the Mayor and Council suspended Petitioner's license for 120 days. A Petition for Certiorari was filed with the local trial court of the State of Georgia challenging the authority of the City of College Park to suspend Petitioner's license and raising the issues purportedly raised in this Petition for Writ of Certiorari.

PROCEEDINGS IN GEORGIA STATE COURTS

Petitioner filed an action in certiorari seeking to review the decision of the Mayor and Council. This petition for certiorari review was denied by order of the judicial authority of the Fulton County Superior Court on July 31, 1987 (see Appendix "A"). The Petitioner sought discretionary appeal pursuant to the procedures of the State of Georgia. This application for discretionary appeal was

denied by the Court of Appeals of the State of Georgia on September 24, 1987 (see Appendix "B").

Finally, Petitioner's Motion for Rehearing on the Denial of Discretionary Appeal was denied by the Court of Appeals of the State of Georgia on October 6, 1987 (see Appendix "C").

The action in equity and for damages referred to in the Petitioner's Brief, and which forms the subject matter of this petition, was resolved by both the trial court and the appellate courts of the State of Georgia by the application of the principles of *res adjudicata*.

REASONS FOR NOT GRANTING THE WRIT

While the Petitioner represents that the case of *McCracken v. City of College Park*, as contained in Appendix "A" of her brief, litigated the issue of the constitutionality of the ordinance of the City of College Park, a closer examination of the same will reveal that two issues were decided in that case; (1) whether or not the trial court abused its discretion in lifting a default by the City of College Park; and (2) whether or not the Petition for Certiorari referred to above resolved the issues presented in Petitioner's case by principles of *res adjudicata*.

It is the Respondent's position that the decision adjudicating the constitutionality of the ordinance of the City of College Park became final upon the denial of motion for rehearing on October 6, 1987. As such, no Petition for Certiorari was filed in this court within the applicable time frames and that decision is not subject to review.

The three questions presented in the Petitioner's brief concerning the issues of due process and vicarious liability are not justiciable in this court in these proceedings. There are serious jurisdictional defects present which would work to preclude review by this court on the purported questions presented by the Petitioner.

As a consequence of the suspension by the Mayor and Council of Petitioner's license to sell alcoholic beverage for 120 days, the Respondents have been subjected to the following legal actions:

- 1) Complaint for Equity and Damages;
- 2) Petition for Certiorari Review of the decision of the Mayor and Council;
- 3) Application for Discretionary Appeal on the Petition for Certiorari;
- 4) Petition for Rehearing on the Denial of Application for Discretionary Appeal on the Denial of Certiorari Review;
- 5) Appeal to the Supreme Court of Georgia on the grant of Summary Judgment on the question of res adjudicata;
- 6) Petition for Writ of Certiorari to the Supreme Court of the United States on the Complaint for Equity and Damages.

In addition to unreasonably pursuing three different avenues of appellate review in three different courts, and their Petition for Writ of Certiorari filed with this Court, the petitioner has compared the activities of the Mayor

and Council of the City of College Park to the activities of the "SS and occupied countries during World War II where, in order to punish parties and activities, they would arbitrarily execute citizens at random . . ." (Petitioner's Brief, p. 4.) She also, indirectly, accuses the Mayor and Council of the City of College Park of misconduct and punishment without proof of guilt in spite of the fact that the Petitioner has had complete due process on all issues. Finally, the Petitioner, indirectly, accuses the Mayor and Council of the City of College Park of being "either corrupt or inept." (Petitioner's Brief, p. 5.)

In light of the unreasonable litigation of the Petitioner, the complete failure of her Petition for Certiorari to the Supreme Court of Georgia to present any justiciable issue to this Court, and the scurrilous, unfounded, and potentially libelous statements of the Petitioner contained in the Petition, the respondents respectfully request that this Court, pursuant to Rule 49, award the respondent appropriate damages.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be denied.

GEORGE E. GLAZE
(Counsel of Record)

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Counsel for Respondents

APPENDICES

Appendix A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

LINDA MCCRACKEN, ET AL., :

Petitioners, :

:

-vs-

: CIVIL ACTION FILE

: NO. D-42957

T. OWEN SMITH, ET AL., :

Respondents. :

ORDER

The within and foregoing Petition for Writ of Certiorari having been brought before this Court by Petitioners and after hearing argument of counsel and reviewing all appropriate materials,

IT IS HEREBY CONSIDERED, ORDERED and ADJUDGED, that the aforesaid Petition be and the same is hereby denied and the decision of the City of College Park is hereby affirmed.

AND IT IS SO ORDERED.

This 31st day of July, 1987.

/s/ Luther Alverson
Luther Alverson
Judge, Fulton Superior Court
Atlanta Judicial Circuit

cc: Glenn Zell
George Glaze

Appendix B

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, September 24, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

APPLICATION NO. 1984

LINDA MC CRACKEN ET AL V. T. OWEN SMITH
ET AL

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby denied.

D-42957

24-26

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP 24, 1987

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
Clerk.

Appendix C

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, October 6, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

APPLICATION NO. 1984

LINDA MC CRACKEN ET AL V. T. OWEN SMITH
ET AL

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

D-42957

24-26

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta OCT 6, 1987

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
CLERK.